

Proposed Modifications to WAC 232-12-292

Washington Department of Fish and Wildlife

June 1, 2001

Wildlife Program
Washington Department of Fish and Wildlife
600 Capitol Way N
Olympia, WA 98501-1091

The bald eagle is listed by the U.S. Fish and Wildlife Service and the Washington Fish and Wildlife Commission as a threatened species. Bald eagle protection rules were enacted in Washington in 1986 to help increase and maintain the bald eagle population by protecting important nesting and communal roosting habitat. The state bald eagle protection rule requires a management plan for development, forest practices or potentially disturbing activities on state and private lands near eagle nests and roosts.

The Department is proposing changes to the rule to clarify the purpose of the rule and to update the rule to conform with current law and practice. The purpose of the rule was to protect habitat so the eagle population could recover from a serious decline and could eventually be delisted. The Department of Fish and Wildlife has written a draft status report to review the classification of the bald eagle. Biologists concluded from the review that the eagle could be downlisted to sensitive status, provided that habitat protection rules remain in effect. This was because, although the eagle population has increased substantially in the last 20 years, two-thirds of Washington eagle nests are on private lands. Land near shorelines is highly desirable for growing residential development, putting pressure on areas where eagles are likely to nest. Only about 10 percent of bald eagle nests are on sites that could be considered secure in the absence of habitat protection rules. The proposed change would add sensitive status to the rule and thereby protect critical nest and communal roost habitat until the eagle is delisted (removed from the classification of endangered, threatened, or sensitive).

The remaining proposed updates are to conform the rule to current law and practice (definitions, appeals procedures).

Proposed additions to the rule are indicated by underlining and deletions by ~~strikeouts~~.

Comments on the proposed changes should be submitted in writing by **September 1, 2001** to:

Manager, Endangered Species Section
Washington Department of Fish and Wildlife
600 Capitol Way N
Olympia, WA 98501-1091

WAC 232-12-292 Bald eagle protection rules.

Purpose

- 1.1 The purpose of these rules is to protect the habitat and thereby increase and maintain the population of the bald eagle so that the species no longer is classified as threatened, ~~or~~ endangered, or sensitive in Washington state. The "delisting" of the bald eagle for Washington state is a realistic goal which can best be accomplished by promoting cooperative efforts to manage for site-specific eagle habitat needs through a process which is sensitive to the site-specific landowner goals as well. The following rules are designed to promote such cooperative management.

Authority

- 2.1 These rules are promulgated pursuant to [RCW 77.12.655](#).

Definitions

- 3.1 "Communal roost site" means all of the physical features surrounding trees used for night roosting that are important to the suitability of the roost for eagle use. These features include flight corridors, sources of disturbance, trees in which eagles spend the night, trees used for perching during arrival or departure and other trees or physical features, such as hills, ridges, or cliffs that provide wind protection.
- 3.2 "Cultural activities" means activities conducted to foster the growth of agricultural plants and animals.
- 3.3 "Delist" means to change the classification of endangered, threatened, or sensitive species to a classification other than endangered, threatened, or sensitive. ~~remove a species from the state special species list by action of the game commission or from the federal endangered species list by action of the secretary of the interior.~~
- 3.4 "Department" means the Department of Fish and Wildlife ~~game~~.
- 3.5 "Endangered" means a species which is seriously threatened with extirpation throughout all or a significant portion of its range within Washington.
- 3.6 "Government entities" means all agencies of federal, state and local governments.
- 3.7 "Landowner" means any individual, private, partnership, nonprofit, municipal, corporate, city, county, or state agency or entity which exercises control over a bald eagle habitat whether such control is based on legal or equitable title, or which manages or holds in trust land in Washington state.

- 3.8 "Nest tree" means any tree that contains a bald eagle nest or has contained a nest.
- 3.9 "Nest site" means all of the physical features surrounding bald eagle nests that are important to normal breeding behavior. These features include alternate and potential nest trees, perch trees, vegetative screening, foraging area, frequently used flight paths, and sources of disturbance. This site is also referred to as the territory defended by a breeding pair of eagles.
- 3.10 "Perch tree" means a tree that is consistently used by eagles. It is often close to a nest or feeding site and is used for resting, hunting, consumption of prey, mating display and as a sentry post to defend the nest.
- 3.11 "Predicides" means chemicals used to kill or control problem wildlife.
- 3.12 "Region" means an ecological/geographic area that forms a unit with respect to eagles, e.g., Hood Canal, lower Columbia River, outer coast and south Puget Sound.
- 3.13 "Sensitive" means any wildlife species native to the state of Washington that is vulnerable or declining and is likely to become endangered or threatened in a significant portion of its range within the state without cooperative management or removal of threats.
- 3.13~~14~~ "Site management plan" means a legal agreement between the department and the landowner for management of a bald eagle nest or communal roost site.
- 3.14~~15~~ "Threatened" means a species that could become endangered within Washington without active management or removal of threats.

Applicability and operation

- 4.1 The department ~~of game~~ shall make available to other governmental entities, interest groups, landowners and individuals information regarding the location and use pattern of eagle nests and communal roosts.
- 4.2 The department ~~of game~~ shall itself and through cooperative efforts (such as memoranda of understandings pursuant to chapter 39.34 RCW) work with other government agencies and organizations to improve the data base for nest and roost site activity and productivity and to protect eagle habitats through site management plans. ~~The department regularly shall confer with other governmental entities to improve the preliminary nest site management information and its accessibility and useability.~~
- 4.3 The department's goal shall be to identify, catalog and prioritize eagle nesting or roost sites. The department or local government shall facilitate landowner notification that

nesting or roost sites exist on their property and work with landowners to develop a site management plan ~~nesting or roost site description~~.

- 4.4 When a proposed land-use activity involves land containing or adjacent to an eagle nest or communal roost, ~~the permitting agency shall immediately notify the department of game of the permit application.~~
- 4.5 ~~When and~~ the department determines that a the proposed activity would adversely impact eagle habitat, a site management plan shall be required. ~~department representative shall meet on-site with the landowner and, where applicable, a representative of the permitting agency to discuss management options for the protection of eagle habitat. The purpose of these discussions shall be to reach agreement on a site management plan for bald eagle habitat protection.~~
- 4.65 It is recognized that normal on-going agricultural activities of land preparation, cultivating, planting, harvesting, other cultural activities, grazing and animal-rearing activities in existing facilities do not have significant adverse consequences for eagles and therefore do not require a site management plan. New building construction, conversion of lands from agriculture to other uses, application of pesticides and aerial pesticide spraying, may, following a conference with the department ~~of game~~, be subject to the site management planning process described in these rules.
- 4.76 Emergency situations, such as insect infestation of crops, requires immediate action on the site management plan or special permission to address the impending crisis by the department ~~of game~~.

Site management plan for bald eagle habitat protection

- 5.1 The purpose of the site management plan is to provide for the protection of specific bald eagle habitat. The department may approve plans developed by other agencies or organizations or work with individual landowners on site management plans. These plans shall ~~in such a way as to~~ recognize the special characteristics of the site and the landowner's property rights, goals and pertinent options. To this end, every land owner shall have fair access to the process including available incentives and benefits. Any relevant factor shall be considered, including, but not limited to, the following:
- 5.1.1 The status of the eagle population in the region.
- 5.1.2 The useful life of the nest or roost trees and condition of the surrounding forest; the topography; accessibility and visibility; and existing and alternative flight paths, perch trees, snags and potential alternative nest and roost trees.
- 5.1.3 Eagle behavior and historical use patterns, available food sources, and vulnerability to disturbance.

- 5.1.4 The surrounding land-use conditions, including degree of development and human use.
- 5.1.5 Land ownership, landowner ability to manage, and flexibility of available landowner options.
- 5.1.6 Appropriate and acceptable incentive mechanisms such as open space property tax assessment, conservation easements, transfer or purchase of development rights, leases, mutual covenants, or land trade or purchase.
- 5.1.7 Published recommendations for eagle habitat protection of other government entities such as the U.S. Fish and Wildlife Service.
- 5.2 The site management plan shall provide for
 - 5.2.1 Tailoring the timing, duration or physical extent of activities to minimize disturbance to the existing eagle habitat and, where appropriate, identifying and taking steps to encourage and create alternative eagle habitat; and
 - 5.2.2 Establishing a periodic review of the plan to monitor whether:
 - a) The plan requires amendment in response to changing eagle and landowner circumstances
 - b) The terms of the plan comply with applicable laws and regulations,
 - c) The parties to the plan are complying with its terms.
- 5.3 The site management plan may also provide for implementing landowner incentive and compensation mechanisms through which the existing eagle habitat can be maintained or enhanced.

Guidelines for acquisition of bald eagle habitat

- 6.1 Real property interests may be acquired and agreements entered into which could enhance protection of bald eagle habitat. These include fee simple acquisition, land trades, conservation easements, transfer or purchase of development rights, leases, and mutual covenants. Acquisition shall be dependent upon having a willing seller and a willing buyer. Whatever interest or method of protection is preferable will depend on the particular use and ownership characteristics of a site. In discussing conservation objectives with private or public landowners, the department shall explore with the landowner the variety of protection methods which may be appropriate and available.
- 6.2 The following criteria and priorities shall be considered by the department when it is contemplating acquiring an interest in a bald eagle habitat.
 - 6.2.1 Site considerations:
 - a) Relative ecological quality, as compared to similar habitats

- b) Ecological viability -- the ability of the habitat and eagle use to persist over time
- c) Defensibility -- the existence of site conditions adequate to protect the eagle habitat from unnatural encroachments
- d) Manageability -- the ability to manage the site to maintain suitable eagle habitat
- e) Proximity to food source
- f) Proximity to other protected eagle habitat
- g) Proximity to department land or other public land
- h) Eagle population density and history of eagle use in the area
- i) The natural diversity of native species, plant communities, aquatic types, and geologic features on the site.

6.2.2 Other considerations

- a) Ownership
- b) Degree of threat
- c) Availability of funding
- d) Existence of willing donor or seller and prior agency interest
- e) Cost

In general, priority shall be given to the most threatened high quality eagle habitats with associated natural values which require the least management.

Resolution of site management plan disputes

- 7.1 The department, the local government, and the landowner and the permitting agency shall ~~work attempt~~ to develop a mutually agreeable site management plan within 30 days of the original notice to the department ~~of game~~. ~~This plan shall become a part of the application for a permit.~~
- 7.2 Should agreement not be reached, the landowner may ~~refer the site management plan to the bald eagle oversight committee (paragraph 8). The committee shall have 30 days from the date contacted to bring about agreement among the department, the landowner, and the permitting agency. The committee may use conciliation, mediation and factfinding, or any other method they deem appropriate to bring about a mutually acceptable resolution of the issues.~~ request an informal settlement conference with the department.
- 7.3 If the landowner chooses not to use the ~~services of the bald eagle oversight committee~~ informal settlement conference process or if resolution is not reached, the department of game shall within 15 days provide a site management plan to the landowner ~~and permitting agency~~.
- 7.4 Upon issuance of a final site management plan, ~~t~~The landowner may initiate a formal appeal of the department ~~of game's~~ decision. Formal appeal procedures appear in [WAC](#)

~~232-12-197.~~ The appeal shall be conducted according to the Administrative Procedures Act, chapter 34.05 RCW and the model rules of procedure, chapter 10-08 WAC.

A request for an appeal shall be in writing and shall be received by the department during office hours within 30 days of the issuance of the final site management plan. Requests for appeal shall be mailed to Department of Fish and Wildlife, 600 Capitol Way N, Olympia, Washington 98501-1091, or hand delivered to 1111 Washington Street SE, Wildlife Management Program, Fifth floor. If there is no timely request for an appeal, the site management plan shall be unappealable.

The written request for an appeal shall be plainly labeled as “Request for Formal Appeal” and shall contain the following:

- (a) The name, address, and phone number of the person requesting the appeal;
- (b) The specific site management plan that the person contests;
- (c) The date of the issuance of the site management plan;
- (d) Specific relief requested; and
- (e) The attorney’s name, address, and phone number, if the person is represented by legal counsel.

The appeal may be conducted by the director, the director’s designee, or by an administrative law judge (ALJ) appointed by the office of administrative hearings. If conducted by an ALJ, the ALJ shall issue an initial order pursuant to RCW 34.05.461. The director or the director’s designee shall review the initial order and enter a final order as provided by RCW 34.05.464.

Bald eagle oversight committee

~~8.1 The director of the department of game shall appoint a five-member bald eagle oversight committee with two members representing landowner interests, two members representing wildlife interests and one nonvoting member from the department of game. Members are appointed for three-year terms, with the initial terms for one, two or three years so that committee appointments will be staggered over time. The committee shall meet at least quarterly, and as needed, to accomplish the following:~~

- ~~8.1.1 Monitor the progress of cooperative bald eagle management processes under these regulations and make recommendations to the department and other interested parties to improve the effectiveness of these processes.~~
- ~~8.1.2 Undertake resolution of site management plan disputes under paragraph 7.2 above.~~
- ~~8.1.3 Coordinate joint efforts on Washington bald eagle protection.~~

~~8.2 The members of the committee shall not receive compensation but shall be reimbursed under [RCW 43.03.050](#) and 43.03.060 for travel expenses incurred while attending official meetings of the committee.~~

Automatic review processes

~~9.1 The bald eagle oversight committee will report to the department of game annually regarding its activities under paragraph 8.1. The department of game will conduct an initial review of the bald eagle regulatory process after 3 years which will include a public hearing, and then every five years thereafter.~~

Penalties

~~108.1~~ Failure of a landowner to comply with the processes set forth in these rules or with the provisions of a site management plan approved by the department constitutes a misdemeanor as set forth in [RCW 77.21.010-77.15.130](#).

[Statutory Authority: [RCW 77.12.655](#). 86-21-010 (Order 283), § 232-12-292, filed 10/3/86.]